85-332

NO.

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1985

THE PARISH OF ST. BERNARD, ET AL,
Defendants-Petitioners,
VS.
UNITED STATES OF AMERICA,
Plaintiffs-Respondents.

PETITION OF THE PARISH OF JEFFERSON AND JEFFERSON PARISH COUNCIL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (CONSOLIDATED CASES NOS. 83-3557, 83-3760 and 84-3082)

VOLUME 1

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QUESTIONS PRESENTED FOR REVIEW

Is the Government[1] entitled under a subrogation theory to recover from a community[2] the amounts paid by the Government for flood insurance claims and adjusters' fees on account of flood damages to properties in the community?[3]

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[1] United States of America.

[2] Defined in the National Flood Insurance Act (NFIA) as being "A State or political subdivision thereof which has zoning and building code jurisdiction over a particular area having special flood hazards". 42 U.S.C. §4003 (a) (1).

[3] This case is one of several, pending in various parts of the country, wherein the Government is seeking recovery from states, municipalities and counties for amounts paid by it under the National Flood Insurance Program (NFIP) on account of flood damages and is the first case to decide the said question which is now one of national importance.

PARTIES TO THE PROCEEDING

The only parties, still remaining in the proceedings, are:

United States of America

Federal Emergency Management Agency

State of Louisiana

Parish of St. Bernard

Police Jury of the Parish of St. Bernard

Parish of Jefferson

Jefferson Parish Council

Pontchartrain Levee District

Jefferson Levee District

West Jefferson Levee District

Lake Borgne Basin Levee District

Burk & Associates

Fireman's Fund Insurance Company

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

THE PARISH OF ST. BERNARD ET AL,
Defendants-Petitioner,
VS.
UNITED STATES OF AMERICA,
Plaintiffs-Respondents.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. St. Bernard Parish* is reported in 756 F.2d at page 1116. the "ORDER AND REASONS" of the District Court is in the appendix hereto.

STATEMENT OF JURISDICTION

The opinion and decree of the Court of Appeal was rendered on April 8, 1985 and was entered on the same date. A petition for rehearing and a suggestion for rehearing in banc were filed on April 22, 1985 and were denied by orders of the Court, dated June 7, 1985 and entered on June 10, 1985. The Court has jurisdiction of this petition for certiorari under the provisions of *28 U.S.C.* §*2101(c)*.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations, all of which are set out verbatim in the appendix hereto, are involved in

this case:

42 U.S.C. §4012(c)
42 U.S.C. §4013(a)
42 U.S.C. §410 (a)(b)
44 C.F.R. §61.13 and appendix thereto
42 U.S.C. §4053
42 U.S.C. §4072
44 C.F.R. 59.24

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition in Courts Below*

The Government filed this action on behalf of the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administration (FIA), the present and former administrators of the National Flood Insurance Program (NFIP), demanding recovery from defendants, including Jefferson Parish and the Jefferson Parish Council (hereinafter collectively "Parish"), of damages in the amount of $76,389,642.81 allegedly for flood insurance claims and adjusters' fees paid by plaintiff on account of the May 3, 1978 and April 12-13, 1980 floods in the metropolitan New Orleans area and prior floods.[4] Mandatory injunctive relief was also sought ordering the Parish to (a) enforce the base flood elevation requirements for the new development mandated for communities participating in the NFIP, (b) implement and enforce standards to insure that proposed development in flood-prone areas is not approved unless the proposed plans call for adequate

[4] Plaintiff's amended complaint, Article 129 (81-1810 NR 191). In addition, damages in the sum of $17,238,478.14 are demanded for similar payments on account of the floods of April 24-25, 1982 and December 4-5, 1982 (83-2007 NR 1).

drainage to reduce exposure to flood hazards, are consistent with the need to minimize flood damage within the flood-prone area, and require that all public utilities and facilities are located and contracted to minimize or eliminate flood damage, (c) implement and enforce standards to insure that proposed construction in flood-prone areas is not approved unless it is designed and adequately anchored to prevent flotation, collapse or lateral movement of the structure, is to be constructed with materials and utility equipment resistant to flood damage, and is to be constructed by methods and practices that minimize flood damage, and (d) comply with and enforce all other requirements of the National Flood Insurance Act (NFIA) and the regulations promulgated thereunder. Parish filed an alternative motion to strike or to dismiss the Government's demand for alternative relief[5] and, also, a motion for summary judgment.[6] Although no specific ruling was made by the District Court on the alternative motion to strike or to dismiss, the District Court partially granted and denied the motion for summary judgment.[7] To the extent that the motion was granted Parish moved for entry of judgment pursuant to FRCP 54 (b); and in accordance with the direction of the Court judgment was entered in favor of the Parish and against the Government dismissing the Government's contract claim, insofar as the complaint seeks monetary damages but not insofar as the complaint seeks specific performance, and the Government's claim to abate a "public nuisance".[8] The Government appealed

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[5] 81-1810 NR 20.

[6] 81-1810 NR 131.

[7] 81-1810 NR 274.

[8] 81-1810 NR 191.

from this judgment. Parish filed in the Court of Appeals an application under *28 U.S.C. §1292(b)* for an appeal from the interlocutory order partially denying the motion for summary judgment, which was initially denied but was granted upon a motion for reconsideration thereof.[9]

A panel of the Court of Appeals found "that subrogation is available to the United States to the extent permitted by Louisiana law" and "that the United States may pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP", and dismissed the remaining claims of the Government. Parish timely filed a petition for rehearing and a suggestion for rehearing in banc, both of which were denied.

(ii) *Statement of Facts*

The Complaint alleges that on or about October 1, 1971 Parish entered the regular phase of the NFIP; that subsequent thereto thousands of residents of Jefferson Parish obtained flood insurance coverage through that program, and that on May 3, 1978 and again on April 12-13, 1980 substantial flooding occurred which caused damages to homes and businesses, covered under the NFIP, throughout the Parish, as a result whereof the Government was required to pay $76,389,642.81 in flood insurance claims and adjusters' fees. It is contended that these flood damages and the resultant flood insurance claims are the direct and proximate result of willful and negligent acts and omissions of Parish and other defendants in the action. Recovery is sought from Parish under several legal

[9]Miscellaneous Docket No. 83-9103 of the Court of Appeals.

theories:

(a) By electing to enter the NFIP Parish contracted to adopt and enforce land use and control measures consistent with the requirements of the NFIP and failed to do so, thus breaching a contract,

(b) Due to certain willful and negligent acts and omissions Parish and other defendants are liable in tort for the resulting flood damage, and

(c) The activities of Parish and other defendants have caused recurrent flooding, consituting a public nuisance under Federal Common Law, which the Government seeks to abate. [This theory has been abandoned (Government's brief in Court of Appeals, p. 20, fn 19)].

BASIS FOR JURISDICTION IN DISTRICT COURT

The District Court has jurisdiction over the subject matter of this matter pursuant to *28 U.S.C. §1345.*

ARGUMENT

Purpose of the NFIP

Although as expressed in the decision of the Court of Appeals the NATIONAL FLOOD INSURANCE ACT OF 1968 *(42 U.S.C. §4001 et seq.)* was enacted to provide previously unavailable flood insurance protection to property owners in flood prone areas, "the principal purpose in enacting the Program was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing

federal flood disaster assistance."[10] *Till v. Unifirst Federal S. & L. Ass'n.*, 5 Cir., 653 F.2d 152, 159. After 1973 the continued participation of a community in a flood-prone area in the Program cannot be categorized as voluntary, inasmuch as the failure of a community in such an area to join or continue in the Program thereafter would have resulted in its financial suicide due to the harsh remedies imposed upon such a community by the 1973 amendment to the Act, namely, the complete cessation of Federal financial assistance to such a community and the curtailment of any loans to it or its citizens by Federally regulated or insured banking or other financial institutions. *42 U.S.C. §4106 (a) and (b).*

The Parish of Jefferson joined the Program in December, 1971. The form of Flood Insurance Policy containing the subrogation clause, was not published in the Federal Regulations until 1976. *44 C.F.R. §61.13, Appendix A.*

A determination as to whether Congress in enacting the NFIA intended to vest in the Administrator of the Program the power to adopt a regulation authorizing the remedy of subrogation against a participating community, such as, the Parish of Jefferson, should be made only after due consideration of the foregoing facts.

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[10] Two of the purposes of the Act, declared by Congress, were to "(3) require States or local communities, as a condition of future Federal financial assistance, to participate in the Flood Insurance Program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses; and (4) require the purchase of flood insurance by property owners who are being assisted by Federal programs or by Federally supervised, regulated or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards." *42 U.S.C. §4002(b) (3)(4).*

The Prerequisites for the Recoupment Remedy

Absent statutory authorization or fraud on the part of the party from whom recovery is sought, which is not alleged in this case, the recoupment remedy under a subrogation theory or otherwise is not available to the Government. *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S.Ct. 1604; *McCullough v. Seamans, D.C. Ca., 348 F.Supp. 511; Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 5 Cir., 445 F.2d 573; *Crescent Wharf, Etc. v. Barracuda Tanker Corp.*, 9 Cir., 696 F.2d 703.

Absence of Statutory Authorization

The NFIA allows the Secretary (Administrator) to "provide by regulation for general terms and conditions of *insurability* which shall be applicable to properties eligible for flood insurance under Section 4012 of this Title",[11] including specified terms and conditions and, also, "any other terms and conditions relating to *insurance coverage or exclusion* which may be necessary to carry out the purposes of this chapter." *42 U.S.C. §4013(a).* The reliance of the Court of Appeals on *Drewett v. Aetna Casualty & Surety Co.*, 5 Cir., 539 F.2d 496, in support of its conclusion that the above quoted provisions of the statute authorize the adoption of a subrogation remedy is totally misplaced. *Drewett* simply involved a situation where a property owner who applied for and obtained insurance while a flood was in progress could not recover under the "loss-in-progress" principle of insurance law. This related solely to "insurance coverage or exclusion", as distinguished from a remedial right, such as, subrogation.

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[11] 42 U.S.C. 4012(c).

Congress specifically provided in the Act for certain remedial rights in the form of judicial actions. *42 U.S.C. §§ 4053 and 4072; Till v. Unifirst Federal S. & L. Ass'n.*, supra, 653 F.2d at page 160. Further, the NFIA "spoke directly to (the) question" with respect to the other remedies available thereunder,[12] namely, suspension from eligiblity from participation in the NFIP,[13] cessation of Federal financial assistance to them and curtailment of any loans to their citizens by Federally regulated or insured banking or other financial institutions. Having thus addressed the problem, Congress proscribed the application of Federal Common Law in order to permit the assertion of claims for reimbursement under the doctrine of subrogation. As stated by this Court in *City of Milwaukee* (451 U.S. at pp. 313-314, 101 S.Ct. at p. 1791):

> "We have always recognized that Federal Common Law is 'subject to the paramount authority of Congress.' (Citation omitted). It is resorted to 'in absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be ansered from Federal Statutes alone'. (Citations omitted)."

If Congress had intended the Government to have a tort remedy under a subrogation theory or otherwise against a community participating in the NFIP, "it knew how to do so and (would have done) so expressly" and

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[12] *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791, 68 L.Ed.2d 114; *Till v. Unifirst S. & L. Ass'n.*, supra.

[13] The authority of the Secretary of Housing and Urban Development to adopt and promulgate the regulation to this effect (44 C.F.R. 59.24) is clearly evident in *42 U.S.C. §4012(c)*.

unambiguously. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572, 99 S.Ct. 2479, 2487, 61 L.Ed.2d 82; *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed. 694. In *Pennhurst* this Court said:

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, 81 L.Ed.2d 1279 (1937); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to acertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Cf. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Surely, the NFIA does not clearly and unambiguously inform communities that by virtue of their participation in the NFIP they are subjecting themselves to tort actions

via a subrogation theory.[14]

Having specifically limited the remedy against such participating communities, Congress precluded the fashioning of a tort remedy against them by means of the adoption of a regulation that would permit the assertion of that type of remedy. This is consistent with the reasoning of this Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146, wherein it said:

> [4] We view quite differently, however, the respondent's claims for damages and other monetary relief under § 206. Unlike § 215,, § 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statue limits a thing to be done in a particular mode, it includes the negative of any other mode."

It would have been unconscionable for Congress to have enacted legislation whereunder premiums for flood insurance would have charged by the Government to people of a "community"[15] and to provide in the same statute

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[14] The FIA, apparently recognized the limitations on its sanctions and remedies under the NFIA, as evidenced by *Town of Falmouth, Mass., Bd. of Selectmen v. Hunter*, D.C. Mass., 427 F.Supp. 26, wherein the town sought an injunction to prohibit its suspension from the NFIP.

[15] Although the NFIA *[42 U.S.C. §4003(a)(1)]* narrowly defines

that upon payment to those same people of the amounts of damages, sustained by them as a result of unusual torrential rains to which their communities might be subjected as a result of God's will, for the reimbursement by them to the Government of the precise amounts paid to them by the Government, plus more.[16] In essence, this is what the Government is asking the Courts to decree to be by implication the intent of Congress in enacting the NFIA.[17] Needless to say, the Parish has no funds to reimburse the Government for the losses other than taxes collected from the people of the "community"; and any reimbursement to the Government would essentially by forthcoming from its policyholders to which it sold insurance. This illustrates the absence of any intent on the part of Congress to provide a subrogation remedy to the Government for recoupment of any losses under the NFIA. The failure of Congress to specify a remedy of subrogation against participating communities, strongly indicates its intention to proscribe such a remedy. Therefore, the Secretary (Administrator) was powerless to create by regulation a remedy which Congress

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(footnote 15 continued)
community "as a State or political subdivision thereof", the broader definition of the word is set forth thusly in *Webster's Third New International Dictionary, Unabridged:*

> "a: STATE, COMMONWEALTH b: the people living in a particular place or region and usu. linked by common interests; broadly: the region itself: any population cluster"

[16] Adjusters' fees and expenses.

[17] This would be contrary to the established insurance doctrine that an insurer, paying a loss, is not subrogated for recovery of the amount thereof from its own insured. *State Farm Fire & Casualty Co. v. Sentry Indemnity Co.*, La. App., 316 So.2d 185, 188; *Olinkraft, Inc. v. Anco Insulation, Inc.*, La. App., 376 So.2d 1301, 1303.

did not intend to provide; and the Government cannot assert such a remedy against the defendants in this case. *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48; *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532; *Insurance Co. of North America vs. Gee*, 2 Cir., 702 F.2d 411, 414; *Pacific Gas & Elec. Co. v. U.S.*, 9 Cir., 664 F.2d 1133, 1136.

PRAYER

WHEREFORE, the premises considered, petitioners pray that a writ of certiorari issue herein directing the United States Court of Appeals for the Fifth Circuit to send up to Your Honors the record of the case aforesaid, to the end that the same may be examined by said Court and that Your Honors may remand the case with instructions or take the whole case and pronounce judgment thereon, which said judgment your petitioners pray should be a reversal of the judgment of the Court of Appeals, making available to the Government a subrogation remedy, and the entry of a judgment dismissing all of the plaintiff's demands against your defendants-petitioners.

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CERTIFICATE

I hereby certify that copies of the foregiong petition were this day mailed to the attorney of record for plaintiff-respondent, United States of America, and to all other counsel of record in these consolidated cases.

New Orleans, Louisiana. August 28th, 1985

GERARD M. DILLON

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,
v.
PARISH OF ST. BERNARD, Police Jury of the Parish of St. Bernard, Lake Borgne Basin Levee District, Fosco Enterprises, Inc., Travelers Insurance Co., Parish of Jefferson and Jefferson Parish Council, Regent Development Corp., Jefferson Levee District, Pontchatrain Levee District, Joseph F. Varisco, Jr., and Terry Tedesco, Inc., Defendants-Appellees.

UNITED STATES of America,
Plaintiff-Appellee,
v.
The PARISH OF JEFFERSON, et al.,
Defendants-Appellants.

Nos. 83-3557, 83-3760 and 84-3082.
United States Court of Appeals,
Fifth Circuit.
April 8, 1985.

United States brought suit against Louisiana public and private defendants, alleging that the parish defendants had caused massive flood damage by violating their contractual and regulatory obligations to adopt and enforce flood control measures consistent with the parishes' participation in the national flood insurance program. The United States District Court for the Eastern District of Louisiana, at New Orleans, Adrian G. Duplantier, J., granted defense motions for summary judgment on several claims, and an interlocutory appeal was taken. The Court

of Appeals, Brown, Circuit Judge, held that: (1) national flood insurance program did not form a contract between participating communities and the United States; (2) no implied right of action was available to the United States under the national flood insurance program; (3) United States was not entitled to an injunction to force the parishes to bring into compliance all areas located in flood plains that were in violation of the federal regulations, as it would not be a proper use of judicial power to force parishes to do what they could decide to avoid doing by simply withdrawing from NFIP; (4) subrogation was, however, available to the United States to the extent permitted by Louisiana law; and (5) United States could pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP.

Affirmed in part, reversed in part, and remanded.

Jerre S. Williams, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, WILLIAMS, and GARWOOD, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

I. Overview

In this exceptionally complicated consolidated action we are presented with what is apparently a question

of first impression under the National Flood Insurance Program (NFIP). The United States Government seeks recovery of over $100 million from various Louisiana public and private defendants. The district judge granted the defendants' motions for summary judgement on several of the government's claims. After various procedural maneuvers, both sides sought, and we granted, an interlocutory appeal to resolve the correctness of the district court's summary disposition.

After briefing, an extended oral argument, and a diligent search of the record, we affirm the district court's opinion dismissing the United States' express contractual claim. Since the government abandoned its public nuisance claim on appeal, its dismissal is not before us. We further hold that no implied right of action is available to the United States under the NFIP. We also find that injunctive relief would be ineffectual and accordingly dismiss the government's claim on this ground. However, we do find that subrogation is available to the United States to the extent permitted by Louisiana law. We further hold that the United States may pursue any available common law right of recovery against the parish defendants so as to recover for any property the parishes owned and insured under the NFIP.

II. Case History

The United States instituted two civil actions on behalf of the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administration (FIA), the present and former administrators of the NFIP: (i) No. 81-1808 against the Parish of St. Bernard, the Police Jury of St. Bernard, the Lake Borgne Levy District, the State of

Louisiana, and various home builders, engineers, and surveyors; and (ii) No. 81-1810 against Jefferson Parish, the Jefferson Parish Council, Firemen's Insurance Fund Company, La Fourche Basin, Pontchatrain Levy District, Jefferson and West Jefferson Levy District, Burk and Associates, and other developers, builders, engineers, and surveyors. The two actions were eventually consolidated. After much jockeying for position, discovery was stayed pending the resolution of the legal availability of the claims filed by the United States.

In its actions the United States alleged that the parish defendants caused massive flood damage by violating their contractual and regulatory obligations to adopt and enforce flood control measures consistent with the parishes' participation in the NFIP. The government sought recovery in contract and implied contract. The United States also contended that the defendants were liable to the United States as subrogee under the policies of the property owners who had been insured and paid in full by the NFIP. The government further claimed that the defendants' actions (or inaction) constituted a public nuisance under Louisiana law. However, as above mentioned, the government later abandoned any public nuisance claim.

The government sought recovery of the money paid to the insured property owners, an injunction for the specific performance of all obligations required from the parishes under the NFIP, and prospective injunctive relief requiring the parish and levy district defendants to implement and enforce the flood control measures in order to minimize future damage.

The parish defendants filed motions for summary judgment. On June 29, 1983, the district court entered an order granting the parishes' motions insofar as the government's complaint sought recovery in contract. The district court's order denied the United States' summary judgment motion for specific performance as a remedy for breach of the alleged contract between the parishes and the United States. The district court also refused to grant the government's summary judgment motion on the availability of subrogation.[1] Thus, over the objection of the United States, the district court entered partial final judgments dismissing the governement's public nuisance claim as to all defendants and dismissing the portions of the United States contractual claims insofar as they sought compensation from the parishes.

On July 28, 1983, in response to the defendant's motions, the district court amended its order to reflect that the partial denial of the parishes' motions presented questions of law appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). Meanwhile, the government filed two new actions, No. 83-2077 and 83-2078, against Jefferson Parish and the Levy District defendants, and St. Bernard Parish and the Levy District defendants, to recover for flood insurance claims paid in 1982. In these suits the government did not name any non-governmental entities as defendants. These actions were subsequently consolidated with the prior actions.

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[1] In another portion of its order which is not presently before us, the district court rejected the c laim of Firemen's Insurance Fund Company that the indemnity policy issued by it to Jefferson Parish did not provide coverage for liability on the claims brought against the parish by the United States and declined to dismiss Firemen's from the case or grant it summary judgment.

On August 10, 1983, we denied the parish defendants' application for interlocutory appeal. The United States then moved for reversal of the partial final summary judgments which had been entered against it in appeals No. 83-3557 and 83-3760.

On February 1. 1984, upon a motion for reconsideration, we reversed our prior ruling and granted the defendants leave to pursue an interlocutory appeal. We simultaneously deferred consideration of the government's motion for summary reversal and requested a full briefing on the merits of the government's appeals from the partial dismissal of the public nuisance claims and the contractual claims insofar as they concerned recovery of the United States' payments under the insurance policies. All appeals were consolidated for briefing and argument.

III. The NFIP

The National Flood Insurance Act of 1968, was enacted by Title XIII of the Housing and Urban Development Act of 1968 Public Law 90-448, August 1, 1968, to provide previously unavailable flood insurance protection to property owners in flood prone areas.[2] 42 U.S.C. § 4001 *et seq.*

Dissatisfied with the lack of commitment being made to the prgram by the municipalities to which insurance was available, Congress added additional incentives for communities to participate in the NFIP. Congress' persuasive stick - used as an aid to the insufficient

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[2] Mudslide protection was added to the program by the Housing and Urban Development Act of 1969, Public Law 91-152 (December 14, 1969). Flood related erosion protection was added to the program by the Flood Disaster Protection Act of 1973, Public Law 93-234 (December 31, 1973).

insurance carrot - was the Flood Disaster Protection Act of 1973.[3]

To qualify for the sale of federally subsidized flood insurance, a community was required to adopt and submit as part of its application, flood plain management regulations. These regulations were designed to reduce or avoid future flood damages.

However, the 1968 Act required a risk study to be undertaken for each community before it could become eligible for the sale of flood insurance. Since this requirement resulted in a delay in providing insurance protection, Congress established an Emergency Flood Insurance Program to permit the early sale of insurance in flood prone communities. The emergency program did not affect the requirement that a community adopt adequate flood plain management regulations; it only permitted insurance to be sold before a study was conducted to determine actual risk premium rates for the particular community. The emergency program still required the charging of actual risk premium rates for all new construction, substantial im-

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[3] *See, Texas Landowners' Rights Association v. Harris*, 453 F.Supp. 1025, 1030 (D.D.C.1978). Congress was concerned because many communities decided it was better to remain outside the program and avoid paying any insurance premiums so long as they were able to collect federal disaster relief. The 1973 Act required the purchase of flood insurance on or after March 2, 1974, as a condition to receiving any form of federal or federally related financial assistance for the acquisition or construction of insurable buildings and mobile homes within and identified special flood, mudslide, or flood related erosion hazard area located within any community participating in the program. The Flood Disaster Protection Act also requires that on or after July 1, 1975, or one year after a community has been formally notified by the Director of the Flood Insurance Program of its identification as a commmunity containing one or more special flood hazards, no such federal financial assistance shall be provided unless the community in which the area is located is then participating in the program.

provements, and high limits of coverage on existing structures when a flood insurance rate map became effective.

To qualify for flood insurance, a community was required to apply for the entire area within its jurisdiction.[4] The program requires the community to designate an agency or official with responsibility, authority, and means to implement the specific requirements of the program and to make an annual report concerning the community's participation in the program.. The regulations provide that a community is subject to suspension from the NFIP for failure to implement adequate flood plain management regulations. During a suspension, no flood insurance may be sold or renewed.

Thus, the Act contemplates the participation of both the federal agency charged with the program's oversight and the local community government charged with implementing the agency's flood plain regulations. Under the regulations, however, ultimate responsibility for community compliance remains with the Agency since it has the power to suspend any municipality for lack of compliance with the NFIP.

IV. Resolution of the Issues

[1] Many of the general principles applicable to the judicial interpretation of flood insurance policy provisions have been established by prior decision. Federal law

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[4] Individual property owners may not purchase flood insurance unless they live in a municipality which has entered the prgam. To achieve Congress' goal of preventing widespread flood damage through prophylactic land use restrictions, an individual who voluntarily complies with the regulations still cannot obtain the benefit of the program without local government action.

governs disputes over coverage arising under the National Flood Insurance Act of 1968. *West v. Harris,* 573 F.2d 873, 880-81 (5th Cir.1978), *cert. denied,* 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979). When such disputes arise, they are resolved under federal law "by drawing upon standard insurance law principles." *Id.* at 881; *Drewett v. Aetna Casualty & Surety Co.,* 539 F.2d 496, 498 (5th Cir.1976). *See Hanover Building Materials v. Guiffrida,* 748 F.2d 1011 (5th Cir.1984). Given the importance and complexity of this case, we discuss each disputed issue separately.

(a) No Express Contract Created

[2, 3] The United States urges that the many letters exchanged between the communities and the agencies charged with implementing the NFIP establish an express contract. In brief, the government reasons that legislation enacted pursuant to the spending power is in the nature of a contract: in return for federal funds, the communities agreee to comply with federally imposed conditions. *Pennhurst State Schools v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981); *United States v. Marion County School District,* 625 F.2d 607, 609 (5th Cir.1980), *cert. denied,* 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 298 (1981). We believe that *Pennhurst* is dispositive of the government's contract claim. The clear holding of *Pennhurst* is that a "contract" can arise only when the state knowingly and voluntarily accepts Congress' terms.

> There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal

> moneys, it must do so unambiguously (citations omitted). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S., at 17, 101 S.Ct. at 1539. Congress failed to make clear in either the statute or regulations that participation in the NFIP created a contract. As a result, the parishes could have no knowing understanding that they would be subjected to almost unlimited liability in actions for monetary damages under the statute by joining the program. We sustain the district court's decision that the NFIP does not form a contract between participating communities and the United States.

(b) No Implied Right of Action

The theory of implied private action is, of course, basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 395 (5th Cir.1980). For over half a century federal courts readily allowed plaintiffs to imply private causes of action. *See, e.g., Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *Texas & P.R.R. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916). The Supreme Court began to reverse this trend in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).[5]

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[5] In more recent cases the Supreme Court has looked almost exclusively to congressional intent - The *Cort v. Ash* criteria being treated as indicia of that intent. *Transamerican Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

In response to the United States argument that we should imply a private right of action under the NFIP, we need go no further than our opinion in *Till v. Unifirst Federal Savings & Loan Association*, 653 F.2d 152, 154 (5th Cir.1981). In *Till*, we were asked to read the language and history of the NFIP as affording a cause of action not explicitly provided for by Congress. We analyzed the NFIP under the factors of *Cort v. Ash*: (1) whether the plaintiff is one of a class for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent to create or deny such remedy; (3) whether such a remedy would be inconsistent with the underlying legislative purpose; and (4) whether the cause of action is one traditionally relegated to state law. *Cort v. Ash, supra*, 422 U.S. at 78, 95 S.Ct. at 2088. As we noted in *Till*, though, in interpreting federal statutues, *Cort* and its progeny have all focused upon the "ultimate issue" of whether is was Congress" intent - either explicit or implicit - to create a private remedy or to deny one. *Till*, at 154.[6]

(footnote 5 continued)
Since deciding *Cort v. Ash*, the Supreme Court has become even more reluctant to imply new private causes of action for damages. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981).

[6] As the court observed in *Touche Ross & Co. v. Edward S. Redington*, 442 U.S. 560, 576, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979), the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort* - the language and focus of the statutue,

Cort v. Ash, supra, 422 U.S. at 78, 95 S.Ct. at 2088. *See California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101 (1981); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074, 1078 (5th Cir.1980), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980).

[4, 5] Our quest for Congress' intent must being with the Supreme Court's warning that in cases where the statutes and legislative history are silent on the question of private remedy, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Rosse & Co. v. Redington, supra*, 422 U.S. at 571, 99 S.Ct. at 2486. Clearly, the principal purpose in enacting the NFIP was to reduce through the implementation of adequate land use controls and the availability of subsidized flood insurance, the massiv and ever increasing burdeon of federal flood disaster assistance.[7] Nowhere in an

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(footnote 6 continued)
its legislative history, and its purpose, *see* 422 U.S. at 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 - are ones traditionally relied upon in determining legislative intent.

[7] In 1968, House Report No. 1585 discussed the purposes and need for a flood insurance program. It stated as follows:

> Heavy losses over the years from hurricanes in the coastal areas and from storms in inland areas of the nation dramatize the lack of insurance protection against flood damage. Insurance protection against the risk of destruction cause by tornadoes and other natural catastrophies is generally available, but it is not available against the risk of flood loss.
>
> Communities along the sea coast or in a river basin become completely immobilized following a major flood. Usually they must depend on the federal government and voluntary relief agencies to provide various forms of assistance. Some state and local governments have limited programs to assist flood stricken areas,

examination of the language of the NFIP and its legislative history can we find evidence that Congress had any intent to allow a private cause of action, either expressly or by implication.

While the Supreme Court in *Touche Ross* refused to imply a private cause of action partly because other sections of the same Act expressly provided for private remedies, we find applicable what was obviously the main thrust of the Court's reasoning: "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington, supra*, 442 US. at 572, 99 S.Ct. at 2487. Thus, as we found in *Till*, where the statue by its terms grants no private rights to any identifiable class and prescribes no conduct as unlawful, further inquiry is foreclosed. We follow *Till* and hold that no cause of action may be implied under the NFIP.

(c) No Injunctive Relief Available

[6, 7] It is black letter law that an injunction will not issue when it would be ineffectual. Under the NFIP a com-

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(footnote 7 continued)

> but disaster relief from all of these sources is inadequate to provide for the necessary restoration of heavily damaged areas. These facts underline the need for a program which will make insurance against flood damage available, encourage persons to become aware of the risk of occupying the flood plains, and *reduce the mounting federal expenditure for disaster relief assistance.* H.Rep.No. 1585, 90th Cong., 2d Sess., reprinted in [1968] U.S.Code Cong. & Adm.News 2873, 2966-67.

For further evidence of the interest of Congress in reducing the burden of federal funds through land use controls and insurance, see Senate Report No. 93-583, 93rd Cong., 1st Sess., reprinted in [1973] U.S.Code Cong. & Adm.News 3217, 3218-20, 3223.

munity may withdraw, or it may be suspended by the agency, if it is not in compliance with the regulations governing flood plain construction and management. Nonetheless, the government seeks an injunction to force the parishes to bring into compliance all areas located in flood plains that are in violation of the regulations. The government also seeks a prospective injunction to keep the communities from engaging in future violations.

We can perceive no utility in such a course. Requiring a community to do acts which it may voluntarily choose to avoid is not a proper exercise of judicial power. In no way is community participation in the NFIP required. Deciding to join or remain under the program is a decision left solely by the statute to the local community. This remians true even after Congress created additional incentives to secure more widespread community participation. As a result, it is not a proper use of judicial power to force the parishes to do what they may decide to avoid doing by simply withdrawing from the program.

Similarly, requiring a community to undertake expensive reconstruction projects to bring itself into compliance with the NFIP is fruitless when the agency already possesses the power to suspend any community which is in violation. We certainly agree with the government that a community must be in compliance to remain in the program. However, that is not equivalent to saying we must force a community to comply by means of an injunction. While we can speculate upon the reasons the United States would like to have the court provide such injunctive relief, suffice it to say that we decline to make it available because the agency already had the power to suspend the parishes until they comply with the flood plain regulations.

(d) Availability of Subrogation

We perceive two inquiries to be dispositive of the United States' claim as to the availability of subrogation. First, we must consider Congress' intent in enacting the NFIP. Second, we must examine the validity of the regulations promulgated by the agency pursuant to Congress' directions.

We first had occasion to consider Congress' intent several years ago in *Drewett v. Aetna Casualty and Surety Co.*, 539 F.2d 496, 497 (5th Cir.1976). The plaintiff in *Drewett* argued that because the statue creating the NFIP anticipated premiums which were lower than the actuarial cost of insuring property in flood prone areas (the difference being subsidized by the federal government, *see* 42 U.S.C. §§ 4014 and 4015), it was inappropriate to apply general insurance law principles, which were originally developed to apply to profit seeking insurance companies.

We held Drewett's contention to be without merit. As we stated in the context of the NFIP as it was then operated:

> [T]he flood insurance program is administered with cooperation between the federal government and private insurance companies; the private companies carry some of the risk, although the federal government stands ready to reinsure and reimburse excessive losses. 42 U.S.C. § 4017, 4041-84. The Program also requires ongoing actuarial studies to help set the premiums to be charged, 42 U.S.C. § 4014. The eventual goal of the Program is to discourage building in flood prone areas by raising, over time, the

> premiums actually charged to equal the actuarial cost of flood insurance. *See* U.S. Code Cong. & Adm. News (1968) at 2969, reprinting House Report No. 1585, 90th Cong., 2d Sess. (1968).
>
> *In short, although the Program offers subsidized flood insurance, it is designed to operate much like any private insurance company and eventually to eliminate the subsidy. Because the Program's exposure to claims and its premiums are required to be estimated in accordance with standard insurance practices, and because private insurers carry part of the risk, it is clear that Congress did not intend to abrogate standard insurance law principles which affect such estimates and risks.* Nothing in the statue or regulations promulgated under it, *see* 24 C.F.R. Part 1909-18, requires otherwise.

Drewett at 498 (emphasis added).

We can perceive no reason the NFIP should be seen as operating differently now that the federal government has displaced private insurance companies. The actuarial studies required for the assessment of risk premiums remains the same. Indeed, the agency has long had the choice of operating the program privately or publicly. The reason the NFIP is now operated entirely by the government is because studies convencingly showed this would achieve greater economy.

As to the second inquiry - the validity of the agency regulations issued to implement the NFIP - it must be noted that the insurance policy used by the government is the same policy issued to property owners when private companies were employed as agents for the government

under the NFIP. When the government assumed the responsibilities formerly performed by the private companies, the agency published the insurance policy in the Code of Federal Regulations. It has been published there ever since. Nonetheless, defendants in these cases contend that the inclusion of the policy's subrogation clause is an unwarranted assumption of power by the agency outside the scope of congressional intent now that the United States operates the program. This, of course, is a very hard road for the defendants to travel since Congress delegated to the agency the responsibility for writing the regulations under which the NFIP would operate.

[8, 9] The standards by which federal regulations are to be judged were well stated in *New York Foreign Freight Forwarders and Brokers Association v. The Federal Maritime Commission*, 337 F.2d 289, 295 (2d Cir.1964), *cert. denied*, 390 U.S. 910, 914, 85 S.Ct. 893, 902, 13 L.Ed.2d 797, 800 (1965). The court observed that: (1) a regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity; and (2) a regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute.

Thus, our scope of review of the agency issued regulations is limited. Such judicial restraint in the assessment of administrative regulations is rooted in a realistic view of the legislative process. Legislation cannot undertake to deal with every situation. Accordingly, Congress creates an administrative agency so that experts who are familiar with the task Congress has identified can address the problems in all their intricacies. The Supreme Court carefully explained the necessary and proper function of agency rulemaking in *American Trucking Associations*,

Inc. v. United States, 334 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953). In that case the Interstate Commerce Commission had issued rules prohibiting short-term or trip leasing by motor carriers. The court held that promulgation of the rules was within the Commission's power - despite the absence of specific reference to leasing practices in the Motor Carrier Act.

> All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or effect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" amoung the literal words of the statuory provisions. As a matter of principle, we might agree with appellant's contention if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Company v. United States*, 319 U.S. 190, 219-20, 63 S.Ct. 997, 1010-11, 87 L.Ed. 1344; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 193-94, 61 S.Ct. 845, 852, 85 L.Ed. 1271. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their

> work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States v. Pennsylvania Railroad Co.*, 323 U.S. 612, 65 S.Ct. 471, 89 L.Ed. 499.

American Trucking, 344 U.S. at 309-10, 73 S.Ct. at 314-15. Similar thoughts on the judicial restraint necessary when assessing agency regulations were expressed more recently by the Supreme Court in *American Union Transport, Inc. v. United States*, 257 F.2d 607, 612 (D.D.C.), *cert. denied*, 358 U.S. 828, 79 S.Ct. 46, 3 L.Ed.2d 67 (1958). The Court focused on "[t]he great complexity of our economy [which] induced Congress to place...the regulation[s] in specialized agencies with broad powers." The Supreme Court emphasized that we must be "slow to interfere with the conclusions of such agencies when [their regulations are] reconciliable with statutory directions."

[10] As to the task of reconciling regulations with their statutory authorization, courts give great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965). "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136, 145 (1946). *See also, Gray v. Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed 301 (1941); *Universal Battery Co. v. United States*, 281 U.S. 580, 583, 50 S.Ct. 422, 423, 74 L.Ed. 1051, 1054 (1930). "Particularly is this respect due when the administrative practice at stake 'involves a

contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *See Udall v. Tallman*, 380 U.S., at 16, 85 S.Ct. at 801, *citing Power Reactor Co. v. International Union of Electrical, Etc.*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 LEd.2d 924, 932 (1961).

[11] Defendants in these cases rely upon the surely correct proposition that the power of an agency when administering a federal statute and prescribing regulations is not the power to make law. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936). We believe the defendant's hornbook restatement of the law to be as accurate as it is inapposite. The inquiry before us is nothing more than the reasonableness of including subrogation as part of Congress' scheme to employ insurance principles as a cost saving mechanism in lieu of direct disaster relief appropriations. We would be disputing with the sophists if we doubted for a moment that:

> government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department - on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself - even when the validity of the practice is the subject of investigation.

See Udall v. Tallman, 380 U.S., at 17, 85 S.Ct. at 801-802, *citing United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73, 35 S.Ct. 309, 312-13, 59 L.Ed. 673, 681 (1915). We hold that the agency's adoption of the insurance policy formerly issued by private companies with its inclusion of a subrogation clause was within the framework contemplated by Congress and that the United States may pursue subrogation.

(e) Parish Liability to Suit and the Availability of a Common Law Remedy[8]

[12, 13] It is settled law that the parishes are not protected from suit by the eleventh amendment. As the Supreme Court observed in *County of Lincoln v. Luning*, 133 U.S. 766, 767, 10 S.Ct. 363, 363, 33 L.Ed. 766 (1889), "the Eleventh Amendment limits...jurisdiction only as to suits against a state." It has been the clear rule since the time of Chief Justice Marshall that "the Eleventh Amendment...is of necessity limited to those suits in which the state is a party on the record." *Osborn v. The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857, 6 L.Ed. 204 (1824).

[14, 15] Since the elventh amendment constitutes no bar to a suit against the parishes, our next inquiry is whether Louisiana law allows such a suit. The doctrine of sovereign immunity has been abandoned in Louisiana. However, this does not mean a parish may be sued for any

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[8] We are aware, of course, that Louisiana is not a common law state. Nonetheless, some term is needed to identify the causes of action outside the NFIP and Louisiana insurance law. We use common law as such a descriptive moniker here.

cause. Parish liability is limited by the step-child of the old doctrine of sovereign immunity - the public duty doctrine. This doctrine, adopted in Louisiana, was well stated in *Stewart v. Schmieder,* 386 So.2d 1351, 1357 (La.1980).

> The rule of official responsibility, then, appears to be this: that if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an adequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. "The failure of a public officer to perform a public duty can constitute and indivdual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury be reason of its non-performance."

[16] The parishes' adoption of flood control measures and their responsibility for inspecting and maintaining defenses against the possibility of rising flood waters does no impel the automatic application of the bar of the public duty doctrine. Louisiana case law permits the conclusion that the parishes can be found liable after trial for the breach of what may be perceived to be at first glance as a public duty. *Bacile v. Parish of Jefferson,* 411 So.2d 1088 (La.App.1981); *Jones v. City of Baton Rouge,* 388 So.2d 737 (La.1980); *McCloud v. Parish of Jefferson,* 383 So.2d 477 (La.App.1980); *Broussard v. Parish of Jefferson,* 375 So.2d 722 (La.App.1979); *Lewis v. Fireman's Fund Ins. Co.,*

342 So.2d 244 (La.App.1977); *Jackson v. Parish of East Baton Rouge,* 331 So.2d 64, 65 (La.App.1076); *Contranchis v. Parish of Jefferson,* 299 So.2d 513 (La.App.1974); *Toppi v. Arbour,* 119 So.2d 621 (La.App.1960).

[17] Of course, it is a fundamental principle of insurance law that an insurer may not sue its own insured on the insurance policy. The law has recognized, however, that there may be causes of action by an insurer outside the policy, i.e. fraud. It is with understanding that we now consider the United States' claim as to the availability of common law remedies.

This circuit, along with others, has recognized that the government has a common law right to recoupment. *Jacquet v. Westerfield,* 569 F.2d 1339, 1345 (5th Cir.1978); *Woods v. United States,* 724 F.2d 1444, 1448 (9th Cir.1984); *United States v. Mead,* 426 F.2d 118, 124 (9th Cir.1970); *United States v. Silliman,* 167 F.2d 607, 610 (3d Cir.1948), *cert. denied,* 335 U.S. 825, 69 S.Ct. 48, 93 L.Ed. 379 (1948). However, an inextricable part of any decision as to the availability of a common law remedy must focus upon not only what remedies were intended by Congress in passing the NFIP, but also upon what remedies were foreclosed.

Thus, although in *Jacquet v. Westerfield* we held that the power to disqualify food stamp recipients on account of fraud was "inherent in the effective administration of such a program," at issue in *Jacquet* was a disqualification regulation. It is with this background that we said "[n]ot only is recoupment an appropriate administrative tool, but the government also has a common law right to recoup value fraudulently obtained from it.'

Jacquet at 1346.

In *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 517 F.2d 329, 338 (5th Cir.1975), *cert. denied,* 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976), we made the observation that "[t]he recoupment right does not always fit consistently and logically into the statutory system, but the alternative of no right to recoup produces even more severe incongruities." Thus, thought the general principle is, as we observed in *United States v. Bellard,* 674 F.2d 330, 333 (5th Cir.1982), that the courts are reluctant to find legislative enactments in derogation of the common law, this general rule cannot be viewed as a talisman; it must be tempered by the specifics of the program adopted by Congress. Accordingly, the availability of common law remedies is primarily a hunt for a species of congressional intent.

In our search of Congress' intent in enacting the NFIP we cannot escape the conclusion that it would be incongrous for the same body which did not contemplate express or implied contractual remedies against the defendants to have intended that the full panoply of common law actions remain available against the same defendants. It is not reasonable for us to conclude that Congress would have thought that the parishes would have voluntarily entered a program such as the NFIP - which involved many restriction upon land use - if they thought they were going to be subject to massive tort liabilities. It is unreasonable to argue, as the United States seemingly does, that the NFIP, a program designed to lessen the massive public outlay for federal disaster assistance, could be foisted in its entire cost onto the very people Congress was trying to protect from the prohibitive cost of flooding.

[18] Our decision that Congress did not intend to allow recovery from the defendants under the whole of common law torts, however, is not tantamount to saying that no action can lie against the parishes for the value of the property the parishes owned and insured under the NFIP. Moreover, since under standard insurance law principles the United States as an insurer cannot sue the parishes as its insureds under the NFIP policies, any action against the parishes concerning parish property insured under the NFIP is extremely limited. Although actions for fraud have traditionally been recognized at common law as a means of recovery from insureds by their insurers, we do not say at this early stage of litigation - prior to any real discovery having occured - that this will be the only non-subrogation action available by the United States against the parishes. It is only with this understanding of the very narrow nature of the causes of action available to the United States against the parishes for the value of the property owned and insured under the NFIP that we give the green light to the United States to pursue common law remedies against the parishes. Suffice it to say since none of the claims that may be articulated in subrogation actions against the parishes are available to the United States as an insurer, any action by the United States against the parishes for the value of the property which the parishes insured under the NFIP must not be in violation of the fundamental principle of insurance law that an insurer cannot sue its insured. To this limited extent expressed in our opinion, a common law remedy is available to the United States against the parishes.

V. Conclusion

By way of summation, we affirm the district court's

summary disposition of the United States' express contract and public nuisance claims. We further hold that the United States is not entitled to pusue an implied right of action or injunctive relief under the NFIP. However, subrogation, and any applicable causes of action at common law which do not violate fundamental insurance law principles for recovery of the value of the property the parishes owned and insured under the NFIP, remain available.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

JERRE S. WILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I concur in all of my brother Brown's opinion for the Court in this case with the exception of IV(a) in which he conlcudes that the conditional grant in aid program did not create a contract between the federal government and the local governmental entities. This conclusion is contrary to a long line of established Supreme Court authority. The 1866 Supreme Court case of *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155, 18 L.Ed 314 said: "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State constituted a contract. All the elements of a contract met in the transaction - competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State." In our own controlling case on this issue, *United States v. Marion County School Dist.*, 625 F.2d 607 (5th Cir.1980), we quoted the *McGee* case at 609 n. 4. The *Marion County* case involved contractual assurances by the school district of compliance with

the prohibitions against racial discrimination in the Civil Rights Act in the operation of federally funded schools. At p. 609, our ruling was specific:

> As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. *E.g., Rex Trailer Co. v. United States,* 350 U.S. 148, 151, 76 S.ct. 219, 221, 100 L.Ed. 149 (1956); *United States v. San Francisco,* 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 675 (1850); *Dugan v. United States,* 16 U.S. (3 Wheat.) 172, 181, 4 L.Ed. 362 (1818).

The same principle is stated in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981), the case relied upon by the majority opinion for the contrary result. In the paragraph immediately preceding the paragraph quoted in the majority opinion, the Supreme Court gives the following recognition to the nature of a conditional grant as a contract:

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." *See Steward Machine Co. v. Davis,* 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, 81 L.Ed.2d 1279 (1937); *Harris v. McRae,*

448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

The conditions the United States Government placed upon the grant in this case were clear and precise. Obviously the government knew that it was undertaking large financial obligations in supplying flood insurance to the citizens of the Parishes. It insisted upon conditions which would substantially cut down on that liability. The conditions which the Parishes were alleged to have breached were two in number. First, they failed to implement and enforce the specific land use and control requirements which they had obligated themselves to enforce. As a result, a number of buildings were built below the flood level elevation requirements which the Parishes promised to meet. Second, even more specifically, the Parishes failed to carry out unequivocal promises concerning the extablishment of adequate drainage systems involving pumps, canals, levies, and culverts. The United States further charges that the Parishes failed to keep drainage pumps in proper repair so that they would operate in situations involving flood emergencies.

These failures had to do with specific promises which the Parishes were required to make to be entitled to obtain for themselves and their citizens the flood insurance protections under the National Flood Control Act and the Flood Disaster Protection Act. I concede, of course, that the Court in *Pennhurst* did state that Congress must intend to impose clearly and unambiguously the conditions on the grant. Of course, the clearness and certainty come from the administrative requirements established under congressional authorization rather than requirements in the statute itself. Virtually all conditional grants by the

federal government occur through an administrative process that establishes the specific conditions and creates the contract under the general grant of authority from the Congress. Congress does not write the contract, nor does it sign it. The administrator writes the contract and signs it on behalf of the government.

It cannot be said in this case, in the words of *Pennhurst*, that a local governmental entity was "unaware of the conditions or [was] unable to ascertain what [was] expected of it." The conditions were clear and precise, and a contract was created under this conditional flood insurance program. A contract is the normal and usual outgrowth of a conditional grant of federal largesse, and there is no reason to treat this case as an exception.

Admittedly the more serious question is not whether a contract was created, but whether the local government bodies can be held liable for the consequential damages arising from their failures to carry out the contract provisions. These failures ultimately resulted in the federal government having to pay large flood insurance claims which, the federal government asserts, would not have arisen if the Parishes had carried out their contract obligations. Of course, upon trial the federal government would have to prove that the failure of the Parishes to carry out these contract obligations caused the damages. But there is absolutely nothing in the law of contracts, governmental or otherwise, giving the Parishes any privileged position with respect to liability for consequential damages for breach of contract. If the government can establish the link in causation, the Parishes are liable under the most elementary common-law principles. 5 Corbin, CONTRACTS §§ 997, 998.

The fact that federal monies were not paid directly to the Parishes but were paid through flood insurance claims to the citizens of the Parish does not alter the nature of the case. In *Grove City College v. Bell*, _____U.S._____, 104 S.Ct. 1211, 1216, 79 L.Ed.2d 516 (1984), the Supreme Court recognized that the College benefitted by a federal aid program even though all funds were paid directly to the students. The Court found that the College, therefore, was subject to the conditions attached to the receipt by the students of the federal financial assistance under the Civil Rights Act. The Court specifically recognized that the federal disbursements to the students benefitted the College through relieving it of financial burdens which it would otherwise have to bear in the absence of the federal assistance. Precisely the same considerations are applicable where it was to the obvious benefit of the Parish to obtain federal flood control insurance for its citizens. The contract existed, and its legal consideration from the point of view of the Parish was the interest of the Parish in obtaining for its citizens the subsidized federal flood control program.

Finally, I stress that I am in full agreement with the conclusion of the Court, in IV(c) of the opinion, that the government is not entitled to specific performance to enforce the contract in the future. The contract was without duration. The sanction for continuing violation of the contract by the Parishes was suspension from the program. 24 C.F.R. § 1909.24. The Parishes are not required by law to continue in the program. They can drop out at any time. *See Guardians Ass'n v. Civil Service Comm. of the City of New York*, _____U.S._____, 103 S.Ct. 3221, 3229, 77 L.Ed.2d 866 (1983). Thus there is no legal right to force them through a specific performance decree to continue to

abide by the contract. This conclusion, however, does not in any way affect the liability of the Parishes for damages to the United States Government while the contract has been in effect. The federal government is entitled to undertake to prove its case with respect to those damages. The district court erred in granting a partial summary judgment against such federal claims. I must dissent because this Court affirms the partial summary judgment which was erroneously granted on this issue.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 83-3557 & 83-3760

UNITED STATES OF AMERICA,
Plaintiff-Appellants,

versus

THE PARISH OF ST. BERNARD, ET AL.,
Defendants-Appellees.

* * * * * * * * * * * * *

No. 84-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THE PARISH OF JEFFERSON, ET AL.,
Defendants-Appellants.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/8/85, 5 Cir. 198__, _____F.2d_____)

(June 10, 1985)

Before BROWN, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM: of Defendants-Appellees Parish of Jefferson, et al.

(Appendix B continued)

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX C

U.S.A.	CIVIL ACTION
VS.	NO. 81-1808
PARISH OF ST. BERNARD, ET AL.	SECTION "H" consolidated with
U.S.A.	CIVIL ACTION NO.
VS.	81-1810
PARISH OF JEFFERSON, ET AL	

ORDER AND REASONS

Plaintiff, United States of America, filed two similar civil actions against various defendants. In Civil Action 81-1808 the defendants are the Parish of St. Bernard, the Police Jury of the Parish of St. Bernard, the Lake Borgne Basin Levee District, the State of Louisiania, and various home builders and surveyors. In Civil Action 81-1810, the defendants are the Parish of Jefferson and its insurer, Fireman's Fund Insurance Co., Jefferson Parish Council, (Fireman's Fund also insures the Council), the Lafourche Basin, Pontchartrain, Jefferson and West Jefferson Levee Districts, and various homebuilders, surveyors, and a design engineer. Travelers Inusrance Co. is also joined as a defendant in the Jefferson Parish suit, as insurer of one of the builders, Regent Development Corp. The two suits have been consolidated.

Jurisdiction over suits commenced by the United States is conferred by 28 U.S.C. 1345.

The complaints allege that the two Louisiana parishes and their respective governing bodies chose to participate in the National Flood Insurance Program, pur-

suant to the National Flood Insurance Act of 1968, 42 U.S.C. §4001 *et seq.*Thousands of residents in each parish thus became eligible for and purchased federally subsidized flood insurance coverage. On May 3, 1978, and again on April 12 and 13, 1980, and on other prior occasions covered by the flood insurance program, substantial flooding occured which caused damages to insured property in both parishes. The United States, claiming that it paid more than $17,000,000 in St. Bernard Parish and more than $76,000,000 in Jefferson Parish in flood claims and adjusters' fees, seeks a variety of relief, including damages, specific performance, and injunctive relief.

The United States seeks to recover from the various defendants upon an array of legal theories:

(a) the parishes and their governing bodies, by electing to enter the National Flood Insurance Program, contracted to adopt and enforce land use and control measures consistent with the requirements of the National Flood Insurance Program and failed to do so, thus breaching the contracts;

(b) by certain willful and negligent acts and omissions, all defendants are liable in tort for the resulting flood damage; and

(c) the activities of defendants have caused recurrent flooding, constituting a public nuisance under federal common law, which plaintiff seeks to abate.

The National Flood Insurance Program was initiated

with the passage of the National Flood Insurance Act of 1968, which made available federally subsidized flood insurance to those communities willing to participate in the program. Legislation in 1973 provided increased incentives to participate in the flood insurance program, including denial of federal financial assistance in flood-prone areas which did not participate in the flood insurance program and, in participating communities, denial of federally-related financing of construction or acquisition of property not covered by flood insurance. 42 U.S.C. §4106(a)(b).

The findings and declaration of purpose of the National Flood Insurance Act reveal several areas of Congressional concern: to relieve the personal hardships and economic distress caused by flooding without increasing the burden of disaster relief programs, to share the risk of flood losses, to foster a unified national program for flood plain management, to guide future development away from flood prone areas, and to encourage continuing studies of flood hazards. 42 U.S.C. §4001, 4002.

The Act provides for jurisdiction in the United States district courts of any action to contest the denial of a claim for flood insurance benefits. 42 U.S.C. §4072. The Act also provides that, as a condition for eligibility for government-supported flood insurance, communities shall adopt sound land use policies designed to minimize flood damage. 42 U.S.C. §4072. The Act also provides that, as a condition for eligibility for government-supported flood insurance, communities shall adopt sound land use policies designed to minimize flood damage. 42 U.S.C. §4022, 4102. Regulations provide in detail the land use measures to be adopted. Failure to adopt such measures may result in suspension of the community from the flood insurance pro-

gram. 44 C.F.R. 59.24. The result of such suspension would be inability of property owners in those parishes to obtain flood insurance or to obtain financing from institutions regulated by or controlled by the federal government. Neither St. Bernard nor Jefferson Parish has been suspended from eligibility in the program.

The cases were referred to a magistrate (28 U.S.C. 636(b)) for consideration of various motions to dismiss or for summary judgment. The magistrate filed a "Finding and Recommendation", to which various objections were filed, with supporting memoranda. The court heard oral argument thereon, and for the oral reasons announced in open court, supplemented by these written reasons, the floowing order was entered:

The Motions to Dismiss or for Summary Judgment filed on behalf of various defendants, seeking to dismiss the contract claim were granted insofar as the complaint seeks specific performance.

The motions of various defendants to dismiss or for summary judgment insofar as the complaint seeks recovery in tort were denied.

The motions of various defendants to dismiss or for summary judgment insofar as the complaint seeks to abate a "public nusiance"were granted.[1]

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[1] Three other motions were decided but are not dealt with herein; the oral reasons being complete: the motion to dismiss insofar as a third party claim is sought to be asserted against the Corps of Engineers, the motion of Fireman's Fund Ins. Co. to dismiss or for summary judgment, and the motion of defendant Krebs for summary judgment.

BREACH OF CONTRACT

The United States seeks damages and specific performance under a breach of contract theory from Jefferson Parish, St. Bernard Parish and their respective governing bodies. It is undisputed that there is no written contract between the parties by virtue of the parishes' participation in the NFIP and, if so, whether the government has a remedy for its breach.

The United States relies upon a number of documents in support of its contract claim in its opposition to the motions for summary judgment. Under the National Flood Insurance Act, the adoption of adequate land use and control measures by local governments is a condition precedent to entry into the flood insurance program, 42 U.S.C. 4022. The governing body of each defendant parish passed a resolution indicating its intent to participate in the NFIP. Thereafter, the parishes were told that various land use and control measures were required by regulations promulgated under the Act. The parish governing bodies in turn adopted ordinances to comply with the regulations. Passage of these resolutions and ordinances, together with the government's subsidization of the flood insurance program, is sufficient evidence to conlcude that an implied contract exists between the parties and that the parishes were aware of and understood their obligations under the contract.

Also at issue is what remedies are available for breach of contract by the parishes. We emphasize that our analysis is based on a cause of action sounding in contract and not a cause of action arising under the National Flood

Insurance Act. For this reason a *Cort v. Ash*[2] analysis is inapplicable. Moreover, we construe *Cort v. Ash* as applicable only to a determination of whether private parties (not the United States) have an implied right of action under a statute.

It has frequently been held that the United States may employ common law remedies to enforce conditions attached to the dispersal of federal benefits. See *Penhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), *United States v. San Francisco*, 310 U.S. 16 (1940), and particularly the following from *United States v. Marion County School District*, 625 F.2d 607, 609 (5th Cir. 1980):

> It is settled law that the United States has authority to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed. *Lau v. Nichols*, 414 U.S. 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *King v. Smith*, 392 U.S. 309, 333, 88 S.Ct. 2128, 2141, 20 L.Ed2d 118 (1968); *Ivanhoe Irrigation District v. McCracken*, 257 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958); *Oklahoma v. Civil Service Commission*, 230 U.S. 127, 143, 67 S.Ct. 544, 553, 91 L.Ed. 794 (1947). As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. *E.g., Rex Trailer Co. v. United States*, 350 U.S. 148, 151, 76 S.Ct. 219, 221,

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[2] 422 U.S. 66 (1975)

100 L.Ed 149 (1956); *United States v. San Francisco,* 210 U.S. 16, 31, 60 S.Ct. 749, 757, 94 L.Ed. 1050 (1940); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 375 (1850); *Dugan v. United States,* 16 U.S. (8 Wheat.) 172, 181, 4 L.Ed. 362 (1818).

Congress can of course nullify the government's right to sue to enforce a contract under the federal common law, but, "as the Supreme Court has repeatedly emphasized, courts are entitled to conclude that Congress has done so only if the evidence of Congress' intent is extremely, even unmistakably, clear. Id at 611.

However, if the United States imposes a condition upon federal funds, it must do so unambiguously. *Penhurst State School and Hospital v. Halderman,* supra. Here the documents show that the conditions imposed on the parishes were unambiguous, and the parishes did not communicate to the government a lack of understanding of their obligations under the Act.

The United States seeks to enforce the conditions of the NFIP through both specific performance and reimbursement of the funds expended to satisfy flood insurance claims made under policies issued to residents of Jefferson and St. Bernard Parish. These two remedies are distinct and are discussed separately.

No case has been called to our attention wherein the United States was granted the right of reimbursement as a remedy for breach of contract. The defendant parishes were not the direct recipients of federal funds; the government seeks reimbursement from the parishes for funds paid

to individual residents of the parishes, as damages for breach of contract. We conclude that it was not Congress' intent to permit reimbursement from the parishes under such circumstances. Neither Congress nor the parish governing bodies foresaw that there would be such an extreme remedy for either a negligent or intentional breach of the contract. Certainly had they foreseen that they might be liable for flood losses and expenses related thereto, the parishes would never have decided to participate in the program. The lack of foreseeability is supported by the documents submitted by the United States, which evidence no indication that the government would seek to enforce compliance with the NFIP regulations by means of reimbursement of monies expended to satisfy flood insurance claims. For these reasons, the government's damage claims for reimbursement for funds expended on flood insurance claims based on breach of contract are dismissed.

However, we conclude that the United States has stated a cause of action for specific performance against the parishes and their governing bodies. The government's right to seek specific performance to enforce contractual obligations has been consistently recognized. Unlike the instant case, in which the citizens of the parishes received the benefit of the NFIP, *United States v. San Francisco, supra* and *United States v. Marion County School District,* both involved specific performance against local agencies which were the direct recipients of federal benefits of obligations attached to their receipt. That distinction, however, is not significant. We conclude that Congress did not intend that the government should be powerless to compel the parishes and their governing bodies to perform obligations clearly undertaken by them as a condition precedent to the issuing of flood insurance policies to the citizens of the parishes.

We do not at this time decide what form the remedy of specific performance may take. Such relief, however, is not precluded by the Tenth Amendment. The parish governing bodies voluntarily decided to participate in this program, albeit that the United States used certain financial incentives to make the program more attractive to local communities. When local governing bodies voluntarily commit themselves to participation in a federal program, they cannot urge that the Tenth Amendment prohibits the United States from compelling them to satisfy their obligations under the contract. *See Texas Landowners Rights Association v. Harris*, 453 F.Supp. 1025 (D.D.C. 1978). We conclude that the plaintiff has stated a cause of action for specific performance of the contracts between it and the two parishes.

TORT CLAIM

The second claim urged by the government is premised on the theory that it has a right of subrogation, either by operation of law or conventionally, to any claim which an insured homeowner may have had against the various defendants with respect to the flood damages sustained by the homeowner. The insurance policies all contained the following subrogation clause:

> "In the event of any payment under this policy, the Insurer shall be subrogated to all the Insured's rights of recovery therefor against any party, and the Insurer may require from the Insured an assignment of all rights of recovery against any party for loss to the extent that payment therefor is made by the Insurer." 44 CPR §61.13, App. (A)(1), General Conditions, "T"; App. A(2), General Conditions, "U."

It is well settled under Louisiana law that a homeowner may assert a cause of action against any party, public or private, allegedly responsible for damage due to flooding. *See, e.g., Eschete v. City of New Orleans,* 258 La. 134, 245 So.2d 383 (La. 1971); *North Forest Homeowners' Assoc. v. Homecraft Corp.,* 407 So.2d 450 (La. App. 1st Cir. 1981); *McCloud v. Parish of Jefferson,* 383 So.2d 477 (La. App. 4th Cir. 1980). *See also Stewart v. Schmeider,* 386 So.2d 1351 (La. 1980); *Mobley v. Rego,* 412 So.2d 1143 (La. App. 2d Cir. 1982). Additionally, there is no question that a determination as to whether the United States is subrogated to that right of the homeowner is an issue controlled by federal law, because, as the Fifth Circuit held in *West v. Harris,* 573 F.2d 878 (5th Cir. 1978), federal common law, in the absence of a Congressional statute, must govern all rights and obligations under NFIP policies. Subrogation is unquestionably one of those rights and obligations.

With regard to the tort claim, the sole issues in dispute are: (A) is there a federal common law right to subrogation?; (B) if so, has that right been preempted by the NFIP?; and (C) are any tort claims prescribed?

Defendants' assertions notwithstanding, the right of subrogation is well established in federal jurisprudence. *See Continental Casualty Co. v. Canadian Ins. Co.,* 605 F.2d 1340 (5th Cir. 1979), *cert. denied,* 445 U.S. 929 (1980); *United States v. Bender Welding & Machine Co.,* 558 F.2d 761 (5th Cir. 1977); *Department of Revenue of the State of New Mexico v. United States,* 408 F.2d 574 (10th Cir. 1969). Defendants rely upon *United States v. Standard Oil Co.,* 332 U.S. 301 (1947), in which the Supreme Court held that in the absence of legislation providing a right of

recovery, the government could not recover from a tortfeasor the amounts expended for an injured soldier's hospitalization and for his compensation during disabiliy. But in *Bender, supra*, at 765, the Fifth Circuit clearly explained that *Standard Oil* was not controlling precedent on issues dealing with subrogation: "*United States v. Standard Oil of California*, 322 U.S. 301, 67 S.Ct. 1604, 81 L.Ed. 2067 (1947), was not a subrogation case, and reliance on the denial of recovery to the Government in that case is misplaced."

Having determined that there is a generally recognized common law right to subrogation, we also conclude that the NFIP has not preempted the application of those federal common law principles. The Supreme Court in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), stated that the key to this decision "[is] whether the legislative scheme '[speaks] directly to the question'...not whether Congress [has] affirmatively proscribed the use of federal common law." In the NFIP, Congress has not affirmatively proscribed the use of federal common law for issues concerning subrogation; neither has it spoken directly to the question. In fact, far from preempting the principles of subrogation, specific provisions of the NFIP appear to support its applicability. In particular, 42 U.S.C. §4013 provides that the Secretary of Housing of Urban Development[3] "shall...provide by regulation for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage."

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[3] All duties imposed by this section on the Secretary of Housing and Urban Development have been transferred to the Director of the Federal Emergency Management Agency by § 202 of Reorganization Plan No. 3 of 1978, set out in Appendix II of Title 5 of the United States Code.

Following the mandate of this section, the Secretary placed the subrogation clause quoted above in the "Standard Flood Insurance Policy" forms, which clause is simply one of those terms or conditions of insurability. *See* 44 C.F.R. §61.13, App. A(1), General Conditions, "T"; App. A(2), General Conditions, "U". Also, several sections of the NFIP, including 42 U.S.C. §§ 4011, 4017, 4046 and 4051-6, show that Congress contemplated that the Secretary would encourage and arrange for the involvement of private insurers; it is undisputable that subrogation clauses are a common part of insurance policies issues by private insurers.

Defendants' position that preemption has occurred is based on *Till v. Unifirst S. & L. Assn.*, 653 F.2d 152 (5th Cir. 1981). The *Till* court held that the NFIP did not imply a right of action for monetary damages on behalf of a property owner-borrower against a federally insured savings and loan association which allegedly failed to follow certain guidelines under the Act. The court reasoned that, since the "*Cort v. Ash* test" for implied rights of action was becoming increasingly stringent and since may administrative remedies were set up to handle "wayward" savings and loans, administrative remedies should be exclusive:

> Once again we are asked to find from the language and history of a federal statute, an implied cause of action not explicitly provided for by Congress. The standards which such a cause of action must meet before it may be implied have become increasingly more stringent.
>
> * * *

> In this case, the Federal Home Loan Bank Board (FHLBB) has the authority to issue cease and desist orders against appellees' officers, to terminate unsafe or unsound practices, to impose administrative remedies, including monetary penalties, and to require affirmative action to prevent or correct violations. Existence of this administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive.

Id. at 157 and 160.

The *Till* decision is notable only in that it is one of the few cases discussing substantive rights under the NFIP; in no way does it deal with the present issue. *Till* did not involve subrogation. More importantly, the issue in *Till* was whether a right of action should be implied from a statute when that right did not otherwise exist. *In the instant situation, the Cort v. Ash* analysis is not relevant, since the question is not whether a right of subrogation can be implied form the statute, but rather, whether the statute preempts the well established common law principle of subrogation. Retaining a right of action under the *City of Milwaukee* test, used in this case is far less stringent than establishing a right of action under *Cort v. Ash*, used in *Till*.

Another issue related to the tort claim is the contention by several defendants that the government's claim has prescribed. We adopt the magistrate's handling of that issue:

> [T]he United States asserts that if it was assigned a claim before the state statute of limitations expired, then the United

States was thereafter subject to the federal statute of limitations for negligence actions, which is three years. 28 U.S.C. §2415(b). The United States claims that if it paid a claim within one year of the date flooding occurred, it then became subject to the three year federal statute of limitations for negligence actions and that this action was timely filed.

It is well settled that asignment to the United States will not revive a claim which has already been barred by a state statute. Guaranty Trust Co. v. United States, 304 U.S. 126, 141-142; 58 S.Ct. 758, 793; 82 L.Ed.2d 1224 (1938). However, in the case of an assignment before the state statute of limitations has run, the case will not be barred until the federal statute has run. *United States v. Summerlin,* 310 U.S. 414, 60 S.Ct. 1019; 84 L.Ed. 1283 (1940); *United States v. Nashville Chattanooga, St. Louis Ry Co.,* 118 U.S. 120, 125; 6 S.Ct. 1006, 1008; 30 L.Ed. 81 (1886). Therefore, the Court must consider whether the claims assigned to the United States were barred by a state statute before their assignment and, if not, whether the federal statute had run before this action was filed.

The applicable state limitations period for flood damages is one year. *Young v. International Paper Company,* 155 So. 231, 179 La. 803 (La. 1934). Assignment of the claims for flood damage occurred at the time the United States paid the claims of its insureds. *State Farm Fire and Casualty Co. v. Sentry Indemnity,* 346 So.2d 1331 (3rd Cir. La. App. 1977). Because the floods out of which the claims of the United States arose occurred at

> various times and flood damage claims were paid at various times, it is impossible to determine on the present record whether all the United States claims are prescribed.
>
> However, it can be determined that all claim derived from flooding which occurred more than four years prior to the filing of the compalaint are prescribed, since the relevant state statute of limitations, one year, as well as the relevant federal limitations period, three years, would have expired. This action was filed May 1, 1981.

Therefore, any tort claim derived from flooding which occurred prior to May 1, 1977, is prescribed. Certain other claims may be prescribed, but this can be determined only after further facts are developed, and not at this stage of the case.

PUBLIC NUISANCE CLAIM

We dismiss the final claim upon which the government seeks relief, based upon its allegation that all defendants have caused recurrent flooding, constituting a public nuisance under federal common law. We do so upon the fundamental ground that the United States lacks "standing" to abate the alleged nuisance, conceding *arguendo* that under federal common law or state law the aggrieved property owners or the state could abate the nuisance.

An inquiry concerning a plaintiff's standing to sue centers around the question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). When the United States "stands" as the party-

plaintiff, a federal court will consider the merits of the action if the government has a sufficient interest at stake. *See United States v. New Orleans Pac. Ry. Co.*, 248 U.S. 507 (1919); *United States v. Waller*, 243 U.S. 452 (1917). The types of interest which have been held sufficient by the Supreme Court were recently discussed by the First Circuit:

> We recognize that the United States may sometimes sue without statutory authority or a pecuniary interest, *see SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940); *United States v. New Orleans Pac. Ry.*, 248 U.S. 507, 518, 39 S.Ct. 175, 63 L.Ed. 888 (1919); *In re Debs*, 158 U.S. 564, 586, 15 S.Ct. 900, 39 L.Ed. 1092 (1895). But in this case there is no national issue of great moment or urgency, no fraud on the United States, and no fiduciary duty owed to an individual such as would justify suit simply under the aegis of constitutional grant and congressional exercise of power.

Ruotolo v. Ruotolo, 572 F.2d 336, 339 (1st Cir. 1978). *See also* Comment, "Protecting the Public Interest: Nonstatutory Suits by the United States", 89 Yale L.J. 118 (1978).

Although the precise issue of the United States' standing to bring suit to abate a public nuisance causing intra-state flooding has not been litigated, several courts have discussed a somewhat analogous situation in the context of a nuisance action for pollution control. *See United States ex rel. Scott v. United States Steel Corp.*, 356 F.Supp. 556 (N.S. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F.Supp. 145 (D. Vt. 1972); *United States v. Lindsay*, 357 F.Supp. 784 (E.D.N.Y. 1973). A thorough

discussion of the issue is contained in the *United States Steel* decision:

> Apparently the United States Supreme Court has never explicitly held that the government of the United States has standing to abate a common law nuisance on behalf of its residents. However, in *New York v. State of New Jersey, et al.*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921) the Supreme Court stated that the Federal government had the undoubted right to intervene to protect the navigable waters from pollution (256 U.S. at p. 308, 41 S.Ct. 492). *See also Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967). The Federal government clearly has a proprietary interest in the navigable waters of Lake Michigan which is bounded by four states. It also has an interest in establishing a "uniform rule of decision" by enforcing a Federal common law. Cf. State of Illinois v. City of Milwaukee, et al., 406 U.S. at p. 105 n. 6, 92 S.Ct. 1385. Hence, since the Federal government could intervene in this litigation, we find and conclude that it has a sufficient independent interest to file it. *Acc., United States of America v. Ira S. Bushey & Sons, Inc., et al.*, 346 F.Supp. 145 (D.Vt.1972); *United States of America v. Reserve Mining Co., et al. (D.Minn. Nov. 30, 1972).*

356 F.Supp. at 558.

Unquestionably, that court's decision hinged on the fact that the pollution involved a navigable body of water bounded by several states. Other public nuisance "pollution" cases, while not specifically mentioning standing,

have also stressed this interstate connexity requirement in finding that the United States could not assert a cause of action of public nuisance when only intrastate effects were alleged in the pleadings.[4] *See, e.g., Reserve Min. Co. v. EPA,* 514 F.2d 492 (8th Cir. 1975). As the Eighth Circuit stated in *Reserve Min. Co.:*

> We reject the federal common law of nuisance as a basis for relief. As forumulated in *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), and *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971), federal nuisance law contemplates, at a minimum, interstate pollution of air or water. The United States, while invoking this doctrine, alleges only that Reserve's discharge "significantly endangers the health of all those persons living in the vicinity of the defendant's taconite ore processing operations."

Id. at 520-1.

We conclude that in the present case, the United States does not have standing to assert a public nuisance claim, since no national interest is at stake. The flooding at issue occurred totally within the borders of Louisiana. Notwithstanding that the flooding could indirectly affect taxpayers throughout the United States, because the government must pay NFIP insureds, no direct interstate interest is implicated.

The government relies for "standing" on *United*

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[4] Several courts have held that the pollution need not be literally interstate if pollution has occurred in navigable waterways. *See, e.g., United States v. Solvents Recovery Serv., Etc.,* 496 F.Supp. 1127 (D. Conn. 1980); *United States v. Ira S. Bushey, supra.*

States v. Ray, 423 F.2d 16 (5th Cir. 1970), in which the United States brought an action to enjoin private construction atop coral reefs on the outer continental shelf. The private developers were plainning to creat independent "nations" on the reefs, claiming that the reefs were subject to colonization by them since they had discovered the reefs. Not surprisingly, the Fifth Circuit determined that the United States had the "exclusive right for purposes of exploration and exploitation of the reefs" since the reefs belonged to the public as a whole, *id.* at 22; and the government had an "important interest to protect in preventing the establishment of a new sovereign nation within four and one-half miles of the Florida Coast," *id.* at 23.f

The facts in *Ray*, quite unlike those in the instant case, present one of the strongest situations imaginable for standing by the United States. In *Ray*, because the object of the threatened harm was a "public thing" beyond state territorial waters and controlled by the United States government for the good of all citizens, the United States was *the* proper party to prevent exploitation of the reefs by private developers. This case, by contrast, involves a purely local matter, an action for which could be brought against the alleged tortfeasors by any threatened private citizen and/or state or local governmental entity; the continual flooding endangers lands under specific, private ownership.

Although we conclude that the government lacks standing, we nevertheless discuss the related and intertwined issue of whether under federal common law there exists a right to abate the type of public nuisance alleged in the complaint.

The United States Supreme Court has recently outlined three situations in which federal common law exists:

> Rather, absent some congressional authorization to forumulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system doesn not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981).

Obviously, there is no contention here that this is an admiralty case, but the government does attempt to justify the application of federal common law under both the "interstate" and the "rights and obligations of the United States" areas.

It is difficult to follow the argument that the instant case involves an "interstate" dispute "implicating the conflicting rights of the States." *Id.* All of the alleged wrongful acts, and the consequences resulting therefrom, occurred within the borders of Louisiana. The government asserts that the economic effects of the flooding are interstate in nature, because taxpayers throughout the country may be

required to subsidize losses in the NFIP. According to the government's analysis, federal common law would apply to any circumstance in which the United States has a substantial monetary interest.

Such an expansive interpretation of federal common law clearly conflicts directly with the Supreme Court's teaching that the instances of federal common law must be "few and restricted." *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963). Examples of the types of "interstate disputes" appropriate for federal common law are interstate pollution, *Illinois v. Milwaukee,* 406 U.S. 91 (1972), and interstate water or boundary disputes, *Hinderlider v. LaPlata River & Cherry Ditch Co.,* 304 U.S. 92 (1938). Certainly, this case is not in the same category.

The government also contends that federal common law is justified on the basis of the "narrow [area]...concerned with the rights and obligations of the United States." *Texas Industries, Inc. v. Radcliff Materials, supra.* Two of the leading cases establishing such common law are *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) (rights and duties of United States on commercial paper it issues pursuant to federal law), and *United States v. Little Lake Misere Land Co.,* 412 U.S. 580 (1973) (because land acquisition was one arising from and bearing heavily upon federal regulatory program, federal law would govern). Both of these cases involved the rights and obligations of the United States in proprietary transactions in which uniformity was a necessity. While this category of federal common law is not limited to proprietary transactions to which the United States government is a party, there must at least be a strong federal interest coupled with the need for uniformity. *See, e.g. Textile Workers Union v. Lincoln*

Mills of Ala., 353 U.S. 448 (1957).

The government points to two cases which, relying on the *Clearfield* analysis, have determined that federal common law governs disputes concerning coverage of NFIP policies. *See West v. Harris*, 573 F.2d 873 (5th Cir. 1978); *Beverly v. Macy*, 702 F.2d 931 (11th Cir. 1983). The *West* court held:

> In sum, federal law controls disputes over the coverage of insurance policies issued pursuant to the National Flood Insurance Act of 1968 regardless of whether the district court exercises jurisdiction under 42 U.S.C.A. § 4053 or under 28 U.S.C.A. § 1332. Congress has undertaken to establish a comprehensive flood insurance program under the control of the Department of HUD to achieve policies national in scope, and the interest in uniformity of decisions compels the application of federal law. As a result, a prevailing plaintiff is not entitled to recover the penalty and attorney's fees provided by Louisiana. Nothing in the decisional law of this circuit or in the provisions of the insurance policy points to a contrary conclusion.

573 F.2d at 881-2.

The instant situation does not fit into the "narrow" *Clearfield* area. There is simply no strong federal interest in isolated flooding. The government is correct that interstate ramifications are not a prerequisite for application of *Clearfield* common law, but such a factor is a consideration going to the degree of interest. As the *Clearfield* Court itself noted:

> The issuance of commericial paper by

> the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

318 U.S. at 367.

In *Clearfield*, the Court realized that thousands of transactions would occur daily, often involving more than one state in the same transaction.

More importantly, the federal common law of nuisance which the government attempts to assert in this case is not closely related to the purported statutory interest, as was the situation in *Clearfield* and its progeny. In those cases, uniformity was required because they involved issues "bearing heavily upon a federal...program." *United States v. Little Lake Misere Land Co., supra*, at 592. For example, in *West v. Harris, supra*, the Fifth Circuit determined that Congress, through the NFIP, had established a "comprehensive flood insurance program...to achieve policies national in scope"; thus, all issues concerning rights and obligations pursuant to an NFIP policy should be determined by a uniform body of law. We decline to apply that to the present case, involving only local flooding.

Finally, the *Clearfield* cases are distinguishable in that, in those cases, if the federal common law sought to be asserted was not accepted as the applicable law, then the

United States had no other method by which to insure that its interests were protected. In this case, the United States is able to force compliance with the NFIP by injunctive relief and, in the event flooding has occurred due to the negligence of contractors or municipalities, by a suit in tort through subrogation to the homeowners' rights.

A finding in this case that the federal common law of nuisance not be applied is compatible with the principle that federal common law is to be invoked "restrictively". *City of Milwaukee v. Illinois and Michigan, supra,* at 313.

This result also draws support from those cases discussing federal common law with regard to pollution. As stated previously, several courts have determined that the nuisance action for pollution could only be asserted if interstate effects were alleged. *See, e.g., Reserve Min. Co. v. Epa, supra; Committee for Jones Falls Sewage System v. Train,* 539 F.2d 1006 (4th Cir. 1976).

July 8, 1983

UNITED STATES DISTRICT JUDGE